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92-1968

Supreme Court, U.S.
FILED
JUL 9 1993
OFFICE OF THE CLERK

IN THE

*SUPREME COURT OF THE UNITED STATES*

OCTOBER TERM, 1992

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CORDELIA ANN BODIE,

*Petitioner,*

v.

CITY OF HUNTSVILLE, et al.,

*Respondents.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# RESPONDENTS' BRIEF IN OPPOSITION

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38 pp

## QUESTIONS PRESENTED FOR REVIEW

I. Whether a "heightened Rule 8" pleading requirement, as applied to civil rights and conspiracy actions is a permissible basis for dismissal of actions brought pursuant to Title 42, U.S.C. Section 1983?

II. Whether a meritorious claim pleading requirement applied to Section 1983 actions, is a permissible ground for dismissal of a civil rights action as "patently frivolous?"

III. Whether there was sufficient grounds to support the determination that the Respondents should be given prevailing party status regarding costs?

## PARTIES TO THE ACTION, INCLUDING PARENT COMPANIES AND SUBSIDIARIES

**Petitioner**

Cordelia Ann Bodie

**Respondents**

City of Huntsville, a municipal corporation

Larry P. Hall, Risk Management Department, City of Huntsville, Alabama

Errol Fitzpatrick, Risk Manager, City of Huntsville, Alabama

Jeff Hamilton, employee of the Health Care Authority for the City of Huntsville, Alabama

Health Care Authority of the City of Huntsville, Alabama d/b/a Huntsville Hospital

Steve Hettinger, Mayor of City of Huntsville, Alabama

Ernest Kaufmann, Council Member, City of Huntsville, Alabama

Bill Kling, Council Member, City of Huntsville, Alabama

Richard Liles, Administrative Assistant to the Mayor of the City of Huntsville, Alabama

James Putnam, Council Member, City of Huntsville, Alabama

Richard Showers, Council Member, City of Huntsville, Alabama

James D. Thorton, III, an independent insurance agent employed by Wikle, Thornton, Holcombe & Associates

James Wall, Jr., Council Member, City of Huntsville, Alabama

Wikle, Thornton, Holcombe & Associates, Inc.[1]

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[1] Respondent, Wikle, Thornton, Holcombe & Associates, Inc. has no parent or subsidary companies.

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IN THE

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OCTOBER TERM , 1992

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CORDELIA ANN BODIE,

*Petitioner*,

v.

CITY OF HUNTSVILLE, et al.,

*Respondents.*

---

# RESPONDENT'S BRIEF IN OPPOSITION

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Respondent Wikle, Thornton, Holcombe & Associates (hereinafter, Wikle & Associates) and Respondent James D. Thornton (hereinafter, "Thornton") assert that the petition for certiorari in the above-referenced matter should be denied.

## OPINIONS BELOW

The opinion of the District Court (Respondents' Appendix C) is an unpublished opinion. The opinion of the Eleventh Circuit Court of Appeals is reported at 978 F. 2d. 774 (Respondents' Appendix A), and the judgment of the Eleventh Circuit Court of Appeals is set forth in (Respondents' Appendix B).

## JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

With the exception of Article I, Section 10 of the United States Constitution and 42 U.S.C. sec. 1988 set forth below, the constitutional and statutory provisions are adequately set forth in the petition.

United States Constitution, Article I, Section 10 provides in pertinent part:

> No state shall pass any Law impairing the Obligation of Contracts.

42 U.S.C. Sec. 1988 provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, ..., the court in its discretion, may allow the prevailing party, other than the United states, a reasonable attorney's fee as part of the costs.

## STATEMENT OF THE CASE

The action currently before the Court was filed by the Petitioner, Cordelia Ann Bodie, on January 10, 1992 in the United States District Court for the Northern District of Alabama, Northeast Division. (R.1-1-1) The Complaint named fifteen defendants and

contained four counts setting forth alleged deprivations of constitutional rights in violation of 42 U.S.C. 1983. (R.1-1-1) An amended Complaint was filed on February 3, 1992 setting forth essentially the same four counts contained in the original Complaint, without material amendment. (R.1-3-1) Subsequent to the filing of the amended Complaint, all Respondents filed Motions to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedures (R.1-4, 5, 7, 8, 10). The district court entered a submission order regarding the pending motions to dismiss, informing the parties to the action that the motions to dismiss would be deemed submitted to the Court for decision at the court's motion docket on March 27, 1992, and setting forth the court's requirement for submission of briefs (R.1-11-1). On April 1, 1992, Petitioner attempted to file a second amended complaint without leave of court as required by Rule 15 of the Federal Rules Civil Procedure. On April 22, 1992, the district court entered an order dismissing all claims against the Respondents (R.1-13-1) (Respondents' Appendix C).

The Petitioner, pro-se, filed Notice of Appeal to the Eleventh Circuit Court on May 15, 1992. (R.1-19). On March 3, 1993, the Eleventh Circuit Court of Appeals affirmed the dismissal of this action and taxed costs against the Petitioner. (Respondents' Appendix A ) Petitioner filed a timely petition for rehearing on March 22, 1993 which was denied by the Eleventh Circuit Court of Appeals on April 12, 1993 (Respondents' Appendix B).

## SUMMARY OF THE ARGUMENT

The petition for writ of certiorari is due to be denied in this matter for several reasons. As a result of this Court's decision in Leatherman v. Tarrant Co., 113 S.Ct. 1160 (1993), all conflicts among the circuits were resolved. Furthermore, the were other adequate grounds upon which the lower courts could, and did, base their decision that the complaint of the Petitioner was due to be dismissed.

An examination of the Petitioner's complaint shows that the cause of action, if any, is barred by the applicable statute of limitations. Specifically, the alleged conduct of these Respondents occurred more than four years prior to the filing of the Petitioner's complaint. Furthermore, the Petitioner fails to state a deprivation of any constitutionally protected right. Petitioner was basically transferred from one location as City nurse to another. This is insufficient to state a cause of action under 42 U.S.C. Sec. 1983. Furthermore, in regard to the allegations concerning the private policy of insurance between the Petitioner and St. Paul Insurance Company, if a cause of action exists, it is merely one of breach of contract.

The Petitioner asks this Court to review the awarding of costs against her. Although the Court of Appeals awarded costs to the Respondents, the district court's determination of costs is not yet final. Therefore, the Respondents assert that any arguments concerning the status of the Respondents as "prevailing parties" is

premature, as there has been no final determination by the district court.

## ARGUMENT

### I. THE RULING IN LEATHERMAN V. TARRANT CO., 113 S.CT. 1160 (1993) RESOLVED ALL CONFLICTS AMONG THE CIRCUITS THEREBY PRECLUDING THE NECESSITY FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI.

Respondents, Wikle & Associates and Thornton concede that the decision rendered by the District Court and Eleventh Circuit Court of Appeals in the matter before the Court is in conflict with the opinion of this Court entered on March 3, 1993 in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160 (1993). The decision of the Eleventh Circuit in this matter was issued on March 3, 1993, the same day that this Court entered its decision in Leatherman. As a result of the opinion in Leatherman, any conflicts among the Courts of Appeal concerning the applicability of a

heightened pleading standard to 1983 actions were resolved. Therefore, the petition for writ of certiorari is due to be denied. Although the decision of the Eleventh Circuit was in conflict with the Leatherman decision, there were other adequate grounds upon which the District Court and Eleventh Circuit Court of Appeals could have dismissed the Complaint of the Petitioner, all of which were asserted by the Respondents in the District Court proceedings and the Appeal before the Eleventh Circuit Court of Appeals.

## II. THE PETITIONER'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

Petitioner's action is clearly barred by the applicable statute of limitations, thereby requiring dismissal of her Complaint. The specific facts alleged by the Petitioner as giving rise to a claim against Respondents, Wikle & Associates and Thornton occurred on January 2, 1986, September 1, 1987 and November 5, 1987. The last alleged conduct by these

Respondents occurred more than four years prior to the filing of the Petitioner's complaint.

In Owens v. Okure, 488 U.S. 235 (1989), this Court held that in states with more than one statute of limitations for personal injury actions, Section 1983 claims were to be governed by the State's general or residual statute for personal injury. Therefore, based upon the Owens decision, the Federal Courts and the Alabama Supreme Court have held that the two-year limitations set forth in Section 6-32-38(1) Code of Alabama (1975) applies to Section 1983 claims in the State of Alabama. McKissick v. Busby, 936 F.2d 520 (11th Cir. 1991); Kimbrough v. Bowman Transportation, Inc, 920 F. 2d 1578 (11th Cir. 1991); Morrow v. Town of Littleville, 576 So. 2d. 210 (Ala. 1991).

In the District Court below, Petitioner contended that her claims were not barred by the limitations as a result of a "continuous conspiracy" among the Respondents. In a continous conspiracy to violate

civil rights, the limitations statute ordinarily runs from the occurrence of each action. Safeguard Mutual Ins. Co. V. Miller, 477 F. Supp. 299 (D.C. Pa. 1979); Hernadez Jimenez v. Carleno Toledo, 604 F.2d 99 (Puerto Rico 1979) When a Plaintiff fails to allege an active concealment of conspiracy within the applicable limitations period, she cannot simply postpone an alleged accrued claim indefinitely on the grounds of an ongoing conspiracy. Singleton v. City of New York, 632 F.2d 185, 192 (2nd Cir. 1980); Vitale v. Muzzo, 674 F. Supp. 402 (D.Conn. 1986). No such allegation of act of concealment is alleged by the Petitioner.

It is evident from the face of the pleadings that any cause of action the Petitioner may have had is barred by the applicable statute of limitations, and therefore, the petition for writ of certiorari is due to be denied.

## III. THE DISTRICT COURT PROPERLY DISMISSED THE PETITIONER'S CLAIMS AS NOT STATING A CAUSE OF ACTION UNDER 42 U.S.C. SECTION 1983.

Petition for writ of certiorari is due to be denied in that, the Plaintiff fails to state a deprivation of a constitutional right as indicated in the Eleventh Circuit's Opinion. In count four of the Appellant's amended Complaint, Petitioner Bodie alleges that Respondents, including Respondents Wikle & Associates and Thornton, conspired and acted in concert to interfere with, and impair the value of, her personal professional liability insurance policy with St. Paul Fire & Marine Insurance Company and that such actions were committed under the color of State law (R.1-3-12). Petitioner asserts that such conduct was in violation of her civil rights, including those guaranteed by 42 U.S.C. Section 1983, and Article 1, Section 10 of the United States Constitution forbidding governmental impairment of the obligation of contracts.

Based upon the previous decisions of this Court, the alleged contractual impairment asserted by Petitioner is not afforded protection under Section 1983. It is well accepted that the range of interests protected by Section 1983 is limited. Board of Regents of State Colleges vs. Roth, 408 U.S. 564, 570 (1972). Section 1983 was intended by Congress to enforce the provisions of the 14th Amendment which is the cornerstone of the statute. Mitchum v. Foster, 407 U.S. 225 (1972); Monroe v. Pape, 365 U.S. 167, 171 (1961).

The scope of constitutional rights included within the 14th Amendment was not intended to "shift the whole of public law of the states into the federal courts." Physician's Serv. Med. Group v. San Bernardino City, 825 F.2d 1404, 1408 (9th Cir. 1987). The bar against enacting laws that impair contractual obligations found in United States Constitution, Article 1, Section 10, has never been incorporated into the sphere of 14th Amendment protection. Spears v. Robinson, 313 F. Supp. 52, 55, aff'd, 431 F.2d 1089

(8th Cir. 1970); Poirier v. Hodges, 445 F. Supp. at 842, and therefore, not within the scope of Section 1983's protection.

Not every claim of constitutional violation is a "civil right" under the statutes. Although some legal rights may be created by contract under State law, it is federal constitutional law that determines whether that interest rises to the level of a "legitimate claim of entitlement protected by the Due Process Clause." Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 9 (1978). The Courts have repeatedly held that there is a distinction between contract interest and protectable property interest. McCormick v. Oklahoma City, 236 U.S. 657 (1915). Only where the breach of contract results in the loss tenured employment, has it been equated with the deprivation of a property interest. Brown v. Brienan, 722 F. 2d. 360, 363 (7th Cir. 1983). It is the legitimate expectation of continued employment, and not the contract itself, that is protected by due process.

Braden v. Texas A&M University System, 636 F. 2d. 90, 92-93 (5th Cir. 1981).

The contract which is the subject of the Petitioner's Complaint and allegations concerns a policy of insurance against negligence by her in her professional capacity. The policy of insurance in question does not constitute a property interest protected by the 14th Amendment, and therefore it is not within the scope of protection afforded by 42 U.S.C. Section 1983. Even though every contract may confer some legal rights under state law, that fact alone does not place the contract within federal due process protection. Physician's Serv. Med. Group v. San Bernardino City, 825 F. 2d. 1404, 1408 (9th Cir. 1987); Walentas v. Lipper, 862 F. 2d. 414, 418 (2nd Cir. 1988).

The conduct which the Petitioner asserts resulted in a constitutional depravation, if it constitutes a cause of action at all, is merely one for breach of contract. It should be noted that the contract in question is

between private parties, the Petitioner and St. Paul Fire & Marine Insurance Company. A simple breach of contract claim does not rise to the level of a constitutional deprivation. Medical Laundry Services v. Board of Trustees of the University of Alabama, 906 F. 2d. 571 (11th Cir. 1990).

Furthermore, Petitioner asserts that her demotion and transfer from the City Clinic to the City Jail constitutes a constitutional deprivation of a protected property or liberty interest. It is well settled that the internal transfer of an employee, without a change in status, is not constitute a loss of a tangible interest. Oladeinde v. City of Birmingham, 963 F.2d 1481 (11th Cir. 1992); Faucher v. Rodziewicz, 891 F.2d 864, 869 (11th Cir. 1990); Volk v. Coler, 845 F.2d 1422, 1430 7th Cir. 1988)

The Petitioner further asserted below that the conduct of the Respondents was in violation of Article I, Section 10 of the United States Constitution. Article I, Section 10 of the Constitution is an independent

obligation upon the states against enacting legislation that would impair legitimate contractual obligations. Therefore, Article I, Section 10 is not a cornerstone of the 14th Amendment as required under Mitchum v. Foster. See also, Poirier v. Hodges, 445 F. Supp. at 842. Furthermore, the alleged conduct asserted by the Petitioner below does not fall within the scope of prohibition against impairment of contracts as provided in Article I, Section 10 of the United States Constitution. The Petitioner alleges that individual conduct impaired her contractual obligations with St. Paul Fire & Marine Insurance Company. Article I, Section 10 of the Constitution is directed to the States and is not applicable to mere individual conduct by persons allegedly acting under the color of state law. Poirier, 445 F. Supp. 842.

## IV. THE LOWER COURTS DID NOT ERR IN AWARDING PREVAILING PARTY STATUS TO THE RESPONDENTS

The statute in question, which provides for the awarding of costs, 42 U.S.C. 1988, provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, ..., the court in its discretion, may allow the prevailing party, other than the United states, a reasonable attorney's fee as part of the costs.

Contrary to Petitioner's assertion, the order and judgment of the District Court was not the result of a private, unrecorded Rule 16(b) pre-trial planning conference. Rather, the dismissal was the result of briefs filed on behalf of all Respondents pursuant to a submission order entered by the District Court.

The cases cited by Petitioner are not applicable to the facts currently before the Court. The cases cited by

the Petitioner, specifically Farrar v. Hobby, 113 S.Ct. 556 (1992) refers to a Plaintiff's designation as a "prevailing party" when a plaintiff has actual relief on the merits. Id. at 573. Petitioner's insinuation that the Respondents' position in this case was a mere "moral satisfaction [that] results from any favorable statement of law" is incorrect. This Court in Farrar stated that there must a judgment, consent decree or settlement such as would alter the legal relationship between the parties in order to result in prevailing party status. A judgment has been entered in the case currently before the Court. However, although the Court of Appeals found that the Respondents were entitled to costs, the district court merely stated that the Respondents **may** be entitled to attorney fees under 42 U.S.C. [sec] 1988. No such determination has been made as of this date. The awarding of attorney fees is still currently before the district court and therefore, not a final determination for review by this Court. Therefore, the Petitioner's presentation of this issue to the Court is premature.

## CONCLUSION

For the reasons set forth above, the petition for certiorari should be denied.

Donald N. Spurrier
Attorney for Respondents
Wikle, Thornton,
Holcombe & Associates
and James D. Thornton

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served upon the following by placing a copy of same in the United States mail, properly addressed and postage prepaid.

This the 9th day of July, 1993.

Cordelia Ann Bodie
1128 Hermitage Avenue
Huntsville, Al. 35801

Joe Campbell
P.O. Box 2087
Huntsville, AL 35804

Kerri Wilson Riley
P.O. Box 308
Huntsville, AL 35804

Donald N. Spurrier
Attorney for Respondents
Wikle, Thornton,
Holcombe & Associates
and James D. Thornton

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 92-6441
Non-Argument Calendar

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D.C. Docket no. 92-N-103-NE

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Cordelia Ann Bodie,

Plaintiff-Appellant

vs.

City of Huntsville, et al,

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Alabama

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Before ANDERSON, DUBINA and CARNES,
Circuit Judges.

PER CURIAM: (Entered March 3, 1993)

Appellant Cordelia Ann Bodie ("Bodie"), filed a pro se civil rights complaint under 42. U.S.C. 1983 in the United States District Court for the Northern District of Alabama alleging that the defendants conspired to violate her constitutional rights. The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

Moreover, the district court held that Bodie's vague and conclusory allegations of conspiracy were insufficient to state federal constitutional claims.

Our review of the record persuades us that the district court was correct in dismissing Bodie's complaint. We have consistently held that mere conclusory allegations are insufficient to state a claim under 42 U.S.C. 1983, particularly for conspiracy claims. See Oladeinde v. City of Birmingham, 963 F.2d 1481, 1485-87 (11th Cir. 1992) (vague allegations, unsupported by specific facts, constitute no basis for a section 1983 action); Fullman v. Graddick, 739 F.2d 553, 556 (11th Cir. 1984) ("[i]n civil rights and conspiracy actions, . . . more than mere conclusory notice pleading is required."). Furthermore, absent a loss of pay or rank, there is no Fourteenth Amendment interest implicated by job transfer. See Oladeinde, 963 F.2d at 1486.

Bodie's claims of conspiracy lack the specificity required in civil rights actions and, in any event, she failed to allege how the defendants abridged her free speech rights or any other constitutional right.

For the foregoing reasons, we affirm the judgment of the

district court. [1]

AFFIRMED.

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1. There is also pending in this cause the Appellees' motion to strike portions of appellant's brief which we deny as moot.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 92-6441
Non-Argument Calendar

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D.C. Docket no. 92-N-103-NE

---

Cordelia Ann Bodie,

Plaintiff-Appellant

vs.

City of Huntsville, et al,

Defendants-Appellees.

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Appeal from the United States District Court
for the Northern District of Alabama

---

Before ANDERSON, DUBINA and CARNES,
Circuit Judges.

JUDGMENT
(Entered March 3, 1993)

This cause came to be heard on the transcript of the record from the Untied States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh

Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-Appellant pay defendants Appellees the costs on appeal to be taxed by the Clerk of this Court.

For the Court: Miguel J. Cortez, Clerk
By: /s/ Deputy Clerk

Issue as Mandate April 26, 1993

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

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NO. CV-92-N-0103-NE

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Cordelia Ann Bodie,

Plaintiff,

vs.

City of Huntsville, et al,

Defendants.

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ORDER OF DISMISSAL

(Entered April 22, 1992)

This civil action is before the court on motion of all the defendants to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. P., for failure to state a claim upon which relief can be granted. The motions have been briefed and submitted for decision. After one complaint, one amended complaint and a proffered second amended complaint, the plaintiff has presented the court with nothing more than twenty pages of single spaced, typewritten, legal silliness. The motions to dismiss will be granted and the action will be dismissed.

According to the complaint, as last amended, the plaintiff, Cordelia Ann Bodie was employed by the City of Huntsville, Alabama, as City Nurse from May 19, 1976 until July 30, 1990, when she resigned her employment. She claims that the defendants conspired to create intolerable working conditions so as to deprive her of the right to employment with the City of Huntsville. The plaintiff recites a series of seemingly unrelated events that allegedly occurred over a period of approximately six years and concludes that she has been the victim of a conspiracy. Vague and conclusory allegations of conspiracy are insufficient as a matter of law to stated federal constitutional claims. Fullman v. Graddick, 739 F.2d 553 (IIth Cir. 1984).

Without recounting all the many details alleged by the plaintiff, it is sufficient to note that she fails to allege any violation of any federally protected right. Almost without exception, she recounts events having to do with the decision of the City of Huntsville to cease the operation of a City Clinic, of which she was director, and to transfer the functions of that clinic to a public hospital, defendant Healthcare Authority of Huntsville. She claims that she was forced to

resign her employment after she was transferred to the city jail because of intolerable working conditions but fails to allege facts which, if proven, would demonstrate that conditions were, in fact, intolerable. She does not claim that she filed any grievance concerning the alleged conditions at the jail. See, Gamer v. Wal-Mart Stores, Inc., 807 F.2d 1536 (11th Cir. 1987).

As noted at the Rule 16(b) conference in this case, the action, at least as to most defendants, is patently frivolous and may entitle them to an award of attorney fees under 42 U.S.C. [sec.] 1988.

This action is DISMISSED and costs are taxed against the plaintiff.

Done, this 22nd day of April, 1992.

/s/ Edwin L. Nelson
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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NO. 92-6441

---

CORDELIA ANN BODIE,

Plaintiff-Appellant

vs.

City of Huntsville, et al,

Defendants-Appellees.

---

Appeal from the United States District Court
for the Northern District of Alabama

---

ON PETITION FOR REHEARING

(Entered April 12, 1993)

Before: ANDERSON, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

The Petition for rehearing filed by appellant Cordelia Ann Bodie is denied.

ENTERED FOR THE COURT:

/s/ Joel f. Dubina
United States Circuit Judge